STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REV. EDWARD PINKNEY,

Defendant-Appellant.
_____/.

S Ct # 154374

COA # 325856

Berrien County Trial Ct. # 2014001528-FH
2nd Judicial Circuit
Hon. Sterling R. Schrock – trial judge

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APPELLANT PINKNEY'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

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Basis for Jurisdiction and Statement Identifying Opinion Appealed

The Court of Appeals opinion in this case is now reported at *People v Pinkney,* 316 Mich App 450; 891 NW2d 891 (2016). Pinkney appealed that judgment by filing an Application for Leave to Appeal with the Michigan Supreme Court on September 3, 2016. This was within 56 days of July 26, 2016, the date of the Court of Appeals opinion. Jurisdiction in the Michigan Supreme Court is pursuant to MCR 7.305(C)(2). The basis for jurisdiction in the lower courts was as follows.

Appellant-Defendant Pinkney was charged in the Berrien County Trial Court: (a) under MCL 168.937 with five (5) felony counts regarding forgery under the election code; and (b) under MCL 168.957 with six (6) misdemeanor counts of falsely certifying petitions for recall petitions. He was convicted of all of the felony charges and acquitted of all of the misdemeanor charges. After sentencing, a judgment was signed and entered on December 15, 2014.

Pinkney filed a timely request for appointment of counsel and to proceed on appeal at public expense which was stamped by the trial court as received on January 26, 2015. On January 30, 2015, the trial court signed a Claim of Appeal and Order Appointing Counsel. Jurisdiction in the Court of Appeals was pursuant to MCR 7.204(2)(a).

Questions Addressed in the Supplemental Filing

I. Whether it violated the Michigan Rules of Evidence, the First Amendment, a number of provisions of the Michigan Constitution and Due Process for evidence of Pinkney's political and community activities to be admitted under MRE 404(b) based on the prosecution's allegations that because Pinkney was politically and socially motivated (as indicated by his political and social activity **that was 100% legal**) that it was likely that he committed the illegal act of forgery that promoted Pinkney's political goal of having the recall go forward? This question must be considered in the context of: (a) the fact that the prosecution admitted political and other First Amendment activity that was **not** the subject of the prosecution's notice of intent to introduce evidence under MRE 404(b); and (b) the fact that Pinkney's political and other First Amendment activity, that was not the subject of the notice, was unpopular with many people in the community and was not relevant to whether Pinkney committed forgery.

> The trial court answered this question "no" in relation to the evidence that it agreed could be admitted pursuant to the prosecution's MRE 404(b) notice, but did not clearly answer this question in relation to the evidence that was not the subject of the prosecution's notice or the trial court's written order.
>
> The Court of Appeals answered this question "no."
>
> Defendant Pinkney answers this question "yes."

II. Whether in relation to the only statute that was the basis of felony counts in the Information, MCL 168.937:

> (a) MCL 168.937 only sets forth a penalty provision for forgeries that are prohibited by other sections of the election code and does not set forth a substantive crime that can be the basis of a prosecution;

(b) Due Process, the vagueness doctrine and the rule of lenity are violated if MCL 168.937 – which merely states forgeries are punishable by up to five (5) years and a fine – is deemed to be a statute which prohibits forgery of any and all documents related to an election; and

(c) there was no jurisdiction in the trial court as the Information failed to state an offense that can be prosecuted when no charges were brought under any other section of the election code?

The trial court answered this question "no."

The Court of Appeals answered this question "no."

Defendant Pinkney answers this question "yes."

Reasons for Granting Leave

Pinkney previously presented the reasons to grant leave in his September 3, 2016 Application for Leave to Appeal filed in the Michigan Supreme Court. With regard to the issues not specified in this Court's order granting oral argument, Pinkney relies on that previous statement. Pinkney now modifies the reasons for granting leave with regard to both questions on which this Court ordered additional briefing: (a) the "other acts" evidence regarding Pinkney's political and community activity not directly related to the petition to recall Mayor Hightower; and (b) whether MCL 168.937 only involves a penalty statute and does not substantively proscribe forgery of any and all documents under the election code.

First, the manner in which the "other acts" evidence was admitted was not consistent with this Court's interpretation of MRE 404(b). It also was not consistent with this Court's analysis regarding admission of associational activity under other rules of evidence. *People v Bynum,* 496 Mich 610; 852 NW 2d 570 (2014) (analyzing matter under MRE 402, 404(a) and 702, this Court held "an expert witness may not use a defendant's gang membership to prove specific instances of conduct in conformity with that gang membership, such as opining that a defendant committed a specific crime because it conformed with his or her membership in a gang."). This case provides an ideal vehicle to clarify Michigan jurisprudence in relation to the Rules of Evidence.

Also, with regard to the "other acts" issues involving Pinkney's political and community activity that was not directly related to the petition to recall Mayor Hightower, a great deal of this activity involved speech, association and the right to petition the government that is at the highest level of protection under the First Amendment. *New York Times v Sullivan,* 376 US 254;84 S Ct 710; 11 L Ed 2d 686 (1964) (at the core of First Amendment protection is political speech while

obscenity and defamation are at the periphery); *Chaplinsky v New Hampshire,* 315 US 568; 62 S Ct 766, 86 L Ed 1031 (1942) ("high-value" speech, such as political speech has more constitutional protection than "low-value" speech, such as obscenity, commercial advertising, and false statement of fact).

Much of the speech and activity was very critical and harsh in relation to local officials. This type of speech is some of the most important under the First Amendment. "'The right of an American citizen to criticize public officials and policies and to advocate peacefully for change is the central meaning of the First Amendment.'" *Lucas v Monroe County,* 203 F3d 964, 973 (6th Cir 2000) quoting *Glasson v City of Louisville,* 518 F2d 899, 904 (6th Cir 1975) and *New York Times Co. v. Sullivan, supra,* 376 US 254; see also, *Chappel v Montgomery County Fire Protection,* 131 F3d 564, 576 (6th Cir 1997).

Also, Pinkney's political activity regarding attempts to recall Sharon Tyler, the Berrien County Clerk, **after the criminal charges were brought against Pinkney,** involved the right to petition the government in relation to the election process itself – a right that is central to our form of government. It is protected under a number of clauses in the First Amendment, including the right to petition clause, and the Mich Const 1963, Art I, § 1 (all political power is inherent in the people), Art I, § 3 ("The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances") and Art I, § 5 (free speech).

The use of this evidence, when the recall efforts of Tyler were completely lawful, should be subject to a great amount of scrutiny. Our form of government directly depends on the ability for invoke, and participate in, the election process. *Arim v General Motors,* 206 Mich App 178, 189; 520 NW2d 695 (1994) ("[T]he First Amendment's protection of the right to petition the

government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government.") quoting *Potters Medical Center v City Hosp Ass'n,* 800 F2d 568, 578 (6th Cir 1986); *Williams v Rhodes,* 393 US 23, 31; 89 S Ct 5; 21 L Ed2d 24 (1968) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.") (footnote omitted) quoting *Wesberry v Sanders,* 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964); *Wilkins v Ann Arbor City Clerk,* 385 Mich 670, 680-81; 189 NW2d 423 (1971) ("It can be stated without exaggeration that the right to vote is one of the most precious, if not the most precious, of all our constitutional rights.").

Also, as stated in the Application for Leave to Appeal, the statutory construction of MCL 168.937 is an important issue presented by this case. The Court of Appeals indicated that the statute proscribes forgery of any and all election code documents. This Court left this issue open in *People v Hall,* 499 Mich 446, 449 n 2; 884 NW2d 561, 563 n 2 (2016). Pinkney submits that this question should be conclusively decided by this Court at this point. Pinkney and Brandon Hall appear to be the only defendants who have presented the issue to the Michigan Court of Appeals. One judge of the Court of Appeals acknowledged at Pinkney's oral argument that the unpublished Court of Appeals decision in *Hall* appeared to be the only appellate opinion to address the issue. Pinkney's application and this supplemental brief thoroughly address this issue. This case presents an ideal vehicle for this Court to consider the matter.

Also, in addition to the arguments presented in Pinkney's Application for Leave to Appeal, it should be noted that one of the reasons the Court of Appeals gave for it decision in relation to MCL 168.937 – that if this statute only involved a penalty provision, it would render

MCL 168.937 as merely surplusage – is invalid. The Court of Appeals believed that MCL 168.935, the provision which penalizes election-code felonies, would provide the same penalty for forgeries as MCL 168.937 even if MCL 168.937 did not exist.[1] This was based on the assumption that forgery is automatically a felony by default.

However, **forgery was a misdemeanor at common law.** *People v Van Alstine,* 57 Mich 69, 72; 23 NW 594, 594 (1885) ("Forgery was a misdemeanor at the common law."); *Jerome v United States,* 318 US 101, 108 n 6; 63 S Ct 483; 87 L Ed 640, 645 (1943) ("Forgery at common law was a misdemeanor. Wharton, *supra,* § 861."); *United States v Watson,* 423 US 411, 440; 96 S Ct 820; 46 L Ed 2d 598, 618-19 (1976) (Marshall, dissenting). Statutory provisions are the means by which forgeries are elevated to felony-status. *Van Alstine,* 57 Mich at 72-73. Related to this issue is the fact that, **at common law, extrajudicial perjury was a misdemeanor.** Thus, the penalty statutes for forgery (MCL 168.937) and perjury (MCL 168. 936) each have a function that is not covered by the penalty statute, MCL 168.935, for felonies in general. See the argument regarding this, *infra, pp. 28-32.*

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[1] This part of the Court of Appeals analysis is set forth in *Pinkney,* 316 Mich App at 464-465 (emphasis added), as follows:

> Additionally, as the *Hall I* panel also correctly recognized, interpreting MCL 168.937 as merely a penalty provision would render that statutory provision mere surplusage. *Hall,* 2014 Mich. App. LEXIS 2031 at *15. That is, because **MCL 168.935 sets forth the penalties for a felony conviction** under the provisions of the Michigan Election Law, **interpreting MCL 168.937 as also setting forth the penalties for a felony, albeit a specific one, adds nothing to the statutory scheme at issue.** *Id.* "This Court must avoid a construction that would render any part of a statute surplusage or nugatory." *Id.* (citation and quotation marks omitted). Stated differently, "[c]ourts must construe a statute in a manner that gives full effect to all its provisions." *Dowdy*, 489 Mich at 379 (emphasis added). If we were to accept defendant's argument and interpret MCL 168.937 as merely a penalty provision, MCL 168.937 would have no effect in light of MCL 168.935.

Statement of Facts

Pinkney set out a detailed Statement of Facts in the Application for Leave to Appeal that he filed with the Michigan Supreme Court on September 3, 2016. The entirety of those facts indicate the weakness in the evidence presented against Pinkney and indicate that any error regarding the "other acts" evidence should result in reversal.

For sake of brevity and judicial economy, Pinkney will not provide a verbatim reiteration of the Statement of Facts as presented in the Application for Leave. Instead, he hereby incorporates the Statement of Facts section from the September 3, 2016 Application for Leave to Appeal. However, for ease of reference, Pinkney again presents the section of that Statement of Facts regarding the "other acts" evidence.

Pinkney also adds a section to this Statement of Facts, that was not set forth in the Application for Leave to Appeal, that indicates the manner in which the prosecutor referenced Pinkney's political and community activity in the prosecution's closing argument.

It is obvious that Pinkney was charged under MCL 168.937 with five (5) felony counts of forgery. There is no need for this Court to consider a detailed set of facts in deciding whether this statute merely involves a penalty provision.

Testimony Regarding the Political Activity of Pinkney and His Speaking Out on Various Matters in Various Forums

A. James Hightower – the Mayor Who Was the Subject of the Recall Petition

Hightower testified that he learned that the petition for his recall was based on his vote of "no" on a proposal to impose an income tax on residents and workers of Benton Harbor. (TT III, Hightower, 684-688) Hightower knew different people, including Pinkney, were pushing for his recall based on Hightower's position on the tax issue. Pinkney was active in advocating

Pinkney's position on the tax issue and for Hightower's recall at city commission meetings. (TT III, Hightower, 689-690) Others, including George Moon (who had previously testified) and city commissioners Muhammed and Bowen, also advocated in favor of imposing the tax. (TT III, Hightower, 691-692) Over objection, the prosecutor indicated that he was personally "convinced" regarding Hightower's position on the tax issue. (TT III, Hightower, 688)

Pinkney was also active in the Black Autonomy Network Community Organization (BANCO) and is the president of the local chapter. (E.g., TT III, Donald, 601-602; TT III, James Cornelius, 655-657; VI, Pinkney, 1610-1611) BANCO is an organization that is often critical of some local officials and big-business interests, including those of the Whirlpool Corporation. Hightower specifically indicated that Pinkney has been critical of Whirlpool. (TT III, Hightower, 700-701) Hightower believed BANCO was negative for the community. (TT III, Hightower, 691) Hightower also indicated the "crux of" the tax matter involved obtaining money from Whirlpool. (TT III, Hightower, 700-701)

Hightower also indicated that Pinkney contacted Hightower's employer in relation to the recall and thought the dispute was not just political, but personal. (TT III, Hightower, 696-699)

B. Sharon Tyler — the Berrien County Clerk

Sharon Tyler, the Berrien County Clerk, testified on the fourth and last day of the prosecutor's case-in-chief. (TT IV, 1399-1409) She testified that Pinkney filed twelve (12) applications to obtain petitions to recall Tyler **after** the recall petitions for James Hightower were submitted to the County Clerk's office. The applications to recall Tyler were filed between **August 19th and October 2nd of 2014**. (TT VI, Tyler, 1406 & 1409) **These recall efforts against Tyler occurred long after criminal charges were brought against Pinkney.** (See, e.g, Trial Court Register of Actions indicating Pinkney's arraignment on **April 25, 2014**) According

to Tyler, all of the recall applications against Tyler were "somehow related to the recall petition drive against Mayor Hightower." (TT VI, Tyler, 1408)

C. Various Other Witnesses

Other witnesses presented by the prosecution testified that Pinkney was very politically active and was vigorous in expressing his views regarding political matters and policy matters impacting the community. A good deal of this involved testimony concerning Hightower, BANCO and Whirlpool. (TT III, Gilmore, 499-500) (Pinkney spoke out against Hightower at city commission meetings and in public places); (TT III, Avant, 528-531) (Pinkney led Banco meeting where people advocated recall); (TT III, Moon, 576) (Moon responds affirmatively when prosecutor asks if Pinkney "discussed Whirlpool being . . . a controlling negative factor" – with court overruling First Amendment objection); (TT III, Moon, 585-586) (Pinkney speaks out against Whirlpool on the street, at City Hall); (Moon, id, at 589-590) (Pinkney speaks out the most regarding "anti-Whirlpool" and "anti-Hightower"); (TT III, Donald, 609) (no one advocated for recall more than Pinkney); (TT V, Adams, 1234-1235 & 1239) (questions and answers about extent and nature of Pinkney's advocacy)

The prosecution also asked at least one witness in its case-in-chief whether Pinkney participates in a radio program. (TT III, Moon, 585) (prosecution asking about radio show) The prosecution also asked Pinkney about this radio show. (TT VI, Pinkney, 1616) The radio show, "Pinkney to Pinkney," presents political and social viewpoints on a wide variety of subjects that are not related to the recall of Hightower. Those viewpoints are considered controversial within the community.

D. Cross-Examination of Pinkney Regarding His Advocacy

The prosecution cross-examined Pinkney about the fact that: (a) he "attends public

meetings and speak[s] out" on various issues; (b) he was a leader in opposing a local development for the Harbor Shores project, which included a senior PGA golf course; (c) he speaks out against Whirlpool; (d) Pinkney is invited to various speaking engagements around the country; (f) nobody "in this community does as much as [Pinkney does] in regards" to the aforementioned issues; (g) "part of [his] search for justice and equality is leading recall efforts"; (h) he was also a leader in the effort to recall school board members; and (i) he has been on the Internet radio program of Pete Santilli. (VI, Pinkney, 1616-1618 & 1620)

The prosecution also asked questions that suggested Pinkney was involved with Ed Billings of Colorado who produces political cartoons that relate to issues regarding various places in the country, including Benton Harbor. Pinkney's counsel objected on grounds of the First and Fourteenth Amendments – but the objections were overruled. Thereafter, the prosecution questioned Pinkney about a proposed exhibit, a cartoon found on BANCO's website, that was never entered into evidence. The court stopped the questioning at that point. (TT VI, Pinkney, 1620-1625)

Pinkney was also cross-examined by the prosecution as to criticism of local institutions and judges on BANCO's website. (TT VI, Pinkney, 1610-1612) This included the prosecution's questions as to whether Pinkney was the president of BANCO and whether:

(a) BANCO's website includes "a great deal of criticism of local institutions"; and

(b) BANCO produces T-shirts with the names of local judges and the statement "crimes against humanity."

The defense attorney objected to this cross-examination based on constitutional and state-law grounds. (TT VI, Pinkney, 1612-1615) While the trial court sustained the objection,

the prosecution indicated it was relevant because "there are a number of matters this defendant is involved in that creates – that – that makes him to be the only one in this community that is that involved." (VI, Pinkney, 1615)

On redirect examination, Pinkney acknowledged that his positions are disliked by many people in the community, while others favor his positions. (TT VII, Pinkney, 1646-1647)

E. The Prosecutor's Closing Argument

The prosecution argued during closing argument as follows, at Vol VII, pp 1688-1690, in relation to Pinkney's political and community activity:

> So he's described as the minister of the people. He's president of BANCO. He says BANCO provides food, clothing, and – and homes for people. Anybody on the witness stand that mentioned BANCO did not include that. They mentioned meetings, activities, they did not mention the food clothing, home that he did. I would suggest to you that the evidence might show that BANCO is not about those things and he's trying to embellish that in the community.
>
> He was a member of the NAACP. He goes to commission meetings. Again, remember, there nothing wrong with doing that, but keep in mind he is a player in the community. He has a radio show, "Pinkney to Pinkney," where he discusses of social injustices, I think was the sort of blanket topic. Again, nothing wrong with it, but he's a player.
>
> The cartoon strips, it didn't really get developed, but he seemed to know what I was talking about. Pete Santilli, some sort of national radio Internet host, he's been on that show. Speaking engagements. He referred to New York; out of state he speaks on those issues. Again, remember, nothing wrong with that. He indicated he was an outspoken critic of the Harbor Shores development, the Senior PGA, Whirlpool. He has T-shirts with judges' names on them described as "crimes against humanity." He's a minister of the people.
>
> He's brought Hollywood celebrities to town. Jesse Jackson. And that's interesting. I think you could take all of this together and see what he wants to be. What he wants to be. And to succeed in recalling the mayor of Benton Harbor would be another – what? – feather in his cap
>
> The people that did talk about him that you heard from, mostly the signers and the – the circulators – one woman said – Helen Jones I think it was – "He's helping me get my kids back." He's helping her get her kids back? Helping with

civil rights complaints. And he comes to court at nine o'clock. He comes here to this building at nine o'clock to watch court. What is he? He's larger than life. He's got his hands in all these pots and he makes things happen. At least to the people that you heard.

Argument

I. The Prosecution Violated the Michigan Rules of Evidence, the Michigan Constitution, the First Amendment and Due Process by Introducing Evidence of Pinkney's Speech, Political Activity and Community Activity.

At trial the prosecution elicited "other acts" evidence regarding matters that were unrelated to whether Pinkney forged the documents in question or allowed people to sign petitions more than once. The improperly admitted evidence included:

A. Sharon Tyler's testimony that Pinkney was involved with twelve (12) recall efforts against her **after** all of the petitions against Hightower were turned in and **even after Pinkney was criminally charged herein** (see Statement of Facts, pp 6-7);

B. Mayor Hightower's testimony regarding Pinkney's involvement with BANCO, anti-Whirlpool activity and political and community affairs not directly related to the effort to recall Hightower (see Statement of Facts, pp 5-6);

C. Testimony from various prosecution witnesses that Pinkney spoke on numerous occasions regarding the tax issue and against Whirlpool and was involved in BANCO and many community and political matters (see Statement of Facts, pg 7); and

D. During the cross-examination of Pinkney, that Pinkney was involved in numerous matters that had nothing to do with the recall of Hightower. These matters are specified at pp 7-9 of the Statement of Facts and included such far-ranging things as whether Pinkney spoke at events across the country and brought well-known individuals to Berrien County in support of some of BANCO's community and political positions.

Notice under MRE 404(b)(2) — On September 29, 2014, the prosecution submitted a Second Amended Notice to Introduce Other Acts Evidence Under MRE 404(b). At pages two (2) to three (3) of the notice, it indicated that the other acts evidence was admissible under MRE

404(b) based on motive. The notice stated, in part, that:

> (a) The motive in this case is someone's desire to recall Mayor James Hightower and in order to accomplish that proceeded to change the dates of signers' signatures so as to include those signatures in the 60 day window of qualification; and
>
> (b) The purpose of this notice is to introduce **evidence of other political activity both before and after the dates of this offense in the Berrien County community** further indicating defendant's motive to change dates and collect double signatures. (emphasis added)

The notice listed three (3) witnesses and indicated they were "aware of the defendant's **political activism** in this county." *Id* at pg 3 (emphasis added) The witnesses were: (a) Carolyn Toliver; (b) James Hightower; and (c) Sharon Tyler. The notice went on to say, on pg 3, the witnesses were aware of Pinkney's "activism" and Pinkney's other recall efforts, including the effort to recall Tyler **which occurred after** Pinkney was charged herein. The "WHEREFORE" clause also specifically indicated that the prosecution was seeking to introduce the testimony of these three witnesses "as it may relate to defendant's political activism." *Id* at pg 4.

The notice did not indicate that the prosecution would seek to admit evidence of Pinkney's various community and political activities – that was completely unrelated to the recall of Hightower – which the prosecution brought out on cross-examination of Pinkney.

On October 20, 2014, the court addressed the "other acts" testimony that was the subject of the second amended notice. In arguing the issue, the prosecution referenced the fact that everyone knows Pinkney had been involved in various political and community activities for "the last decade and half or so." (Status Conf of 10-20-14, Amended Transcript,[2] at 9-10) The

[2] An Amended Transcript for the October 20, 2014 Status Conference was certified on November 11, 2015. The page references in the Amended Transcripts shifted slightly when compared to the prior transcript. See Appellant's December 17, 2015 letter to the Court of Appeals.

prosecution specifically indicated that none of these activities were "bad acts" but were "other acts." (Status Conf of 10-20-14, Amended Transcript, at 10)

The trial court addressed the issues on the record at the hearing. In an order entered on October 27, 2014, the trial court indicated, in pertinent part, that:

> A. Hightower would be allowed to testify to Pinkney's "participation in the effort to recall Hightower," to Pinkney's "participation in public comments relative to anti-Hightower and a Hightower-Whirlpool alliance" and Pinkney's "participation in advocating for a 'yes' vote on the city income tax issue";
>
> B. Tyler would be allowed to testify to Pinkney's "participation relating to recall efforts of her due to her function as clerk in the Hightower recall process"; and
>
> C. Circulators would be allowed to testify to Pinkney's participation in the recall of Hightower and in "anti-Hightower and Hightower-Whirlpool alliance."

Preservation of Issue and Standards of Review: On October 13, 2014, Pinkney filed a nine (9) page document containing objections to the 404(b) evidence that was the subject of the prosecution's Second Amended Notice. Pinkney asserted the evidence was inadmissible under MRE 404(b) and the First Amendment. Pinkney specifically indicated that his political views are not popular with some people in the community and that introduction of this evidence had great potential to unfairly prejudice him in eyes of some jurors. Among other things, he also indicated: (a) it was not proper "motive" evidence under MRE 404(b) as defined by Michigan case law; and (b) it was actually propensity evidence – to show that Pinkney acted in conformity with his political views.

Also, defense counsel objected at the October 20, 2014 hearing, and during the trial on several occasions, in relation to the prosecution's admission of 404(b) evidence in its case-in-chief. A number of these objections at the status conference and during the trial included

reference to the Michigan Rules of Evidence, the First Amendment and the Fourteenth Amendment. (TT III, Avant, 530 – objection based on "constitutional right to advocate on public issues"); (TT III, Moon, 576-576 & 578 – objection and request for jury instruction based on constitutional protection of public views; at 578 – "goes way beyond any possible relevance"); (TT III, Hightower, objection under MRE 401 and MRE 403 as to whether Pinkney wrote Hightower's boss); (Status Conf of 10-20-14, Amended Transcript, at 9 – adds objections to "other acts" based on MRE 401 and MRE 403); (Status Conf of 10-20-14, Amended Transcript, at 20 – objection based on constitutional rights); (Status Conf of 10-20-14, Amended Transcript, at 23 – undue prejudice because jury may not like Pinkney's stances on issues)

Standard of Review for "Other Acts" Evidence That was the Subject of the Prosecutor's Pre-trial Notice

With regard to the admission of evidence, preliminary questions of law are reviewed *de novo*. Discretionary evidentiary rulings are reviewed under the abuse of discretion standard. This distinction was clearly set forth in *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.* In determining whether there was a legally proper purpose for admission of 404(b) evidence, this Court recently reiterated that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Rock v Crocker,* 499 Mich 247, 255; 884 NW 2d 227 (2016) quoting *Craig v Oakwood Hosp,* 471 Mich 67, 76; 684 NW2d 296 (2004); see also, *United States v Gessa,* 971 F.2d 1257, 1261 (6th Cir. 1992) (en banc) (whether there was a proper purpose, such as intent, preparation or plan, under FRE 404(b) is "a legal determination"). This Court has "stress[ed] that the relationship between the proffered MRE 404(b) evidence and the ultimate fact sought to be proven must be 'closely scrutinized.'" *People v Layher,* 464 Mich 756,

774 n 9; 631 NW2d 281 (2001) (citations omitted). Under 404(b), "the balancing of the probative value of the other acts evidence against its prejudicial effect" is the only component that is reviewed for an abuse of discretion. *United States v Fountain,* 2 F 3d 656, 667 (6th Cir 1993) quoting and citing *Gessa,* 971 F.3d at 1261-1262.

Standard of Review for "Other Acts" Evidence for Which the Prosecution Provided No Notice Under MRE 404(b)(2)

With regard to the aforementioned evidence solicited on cross-examination of Pinkney, the prosecution filed no notice under MRE 404(b)(2) that it intended to present this evidence. While there is no published authority on point, the prosecution was required to provide notice under MRE 404(b)(2) that it would inquire into these activities on cross-examination. *People v Janiskee,* Mich COA # 306754, slip op pg 3 (10-25-12) (attached).

"[T]he essential value and underlying aims of MRE 404(b)(2) are (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record." *People v Hawkins,* 245 Mich App 439, 454-455; 628 NW2d 105 (2001) interpreting *People v Sabin (After Remand),* 463 Mich 43; 614 NW2d 888 (2000).

When the prosecution fails to give proper notice under MRE 404(b)(2) prior to the admission of the evidence, it may be plain error if, had the notice been given, defense counsel would have objected or been able to prepare to take different actions. *Hawkins,* 245 Mich App at 455-456; see also, *People v Ullah,* 216 Mich App 669, 673-676; 550 NW2d 568 (1996) (error regarding its admission requires reversal if the prosecutor ultimately cites an improper purpose,

the evidence is not relevant to an element of the offense and the jury may have given improper prejudicial weight to the evidence). Whatever test applies in relation to the lack of notice, it must consider the purpose for the requirement of notice. *Hawkins,* 245 Mich App at 455 ("this case does not invoke the Supreme Court's concern that, without notice, the prosecutor was able to use irrelevant, inadmissible prior bad acts evidence to secure Hawkins' conviction.").

Even without the proper notice, Pinkney's counsel requested to approach the bench and objected on constitutional grounds and state law grounds during the cross-examination of Pinkney after some of the questions had been asked and answered. (TT VI, Pinkney, 1613-1615 & 1620-25) Defense counsel did this without making the objections in front of the jury because he knew the court "did not want a speech about it" and wanted to make the objection to the court outside of the hearing of the jury. However, the trial court would not "listen to a speech now" at the bench. The trial court required defense counsel, during this cross-examination, to make the objections in front of the jury "without speechifying." (TT VI, Pinkney, 1613-1614)

Standard of Review for Constitutional Issues

Preserved constitutional issues of law are reviewed *de novo. Eg, People v Grant,* 470 Mich 477, 484; 684 NW 2d 686 (2004) citing *Tolksdorf v Griffith,* 464 Mich 1, 5; 626 NW2d 163 (2001). Counsel preserved the objections on constitutional grounds in his response to the prosecution's notice under 404(b)(2) and at various points during the trial. As indicated in more detail below, the constitutional grounds are also preserved due to the fact that the trial court specifically indicated it would not allow objections to "other acts" evidence based on constitutional grounds.

The trial court precluded Pinkney's counsel from objecting on constitutional grounds on the first day of testimony as follows. The court indicated that it did not want Pinkney's counsel

to object on constitutional grounds while in the presence of the jury. The trial court indicated this was only an emotional appeal and not proper grounds for objection. (TT III, Bench Conf, 577-578) (at pg 577, after objection based on free speech and association concerns related to evidence of Pinkney's political activity, the trial court asked counsel to approach the bench and stated, among other things: "What I am asking you not to do is use words like (indiscernible) and using constitutional rights and using things like that . . .") (at pg 578, "There are ways to say that without using that rhetoric which clearly plays with emotions. And it's improper, it's not legalese. It is not even close.") Due to the court's restrictions on the ability to object on constitutional grounds, errors on these grounds are also preserved regardless of whether there was an objection and independent of the violation of the notice requirements of MRE 404(b)(2). *People v Wilkins,* 184 Mich App 443, 450-451; 459 NW2d 57 (1990) (the trial court "refus[ed] to allow defense counsel an opportunity to make an offer of proof as to the excluded testimony."); *Alpha Capital Mgmt v Rentenbach,* 287 Mich App 589, 619; 792 NW2d 344 (2010) (abuse of discretion to prevent party from fully exercising right to make offer of proof) and *Barksdale v Bert's Marketplace,* 289 Mich App 652, 657; 797 NW2d 700 (2010) (same).

Argument

The prosecution utilized Pinkney's completely legitimate political and community activities based on the claim that because he is so involved with many political and community matters – including those far removed from the Hightower recall effort – he also was willing to commit illegal acts to promote his position in this recall. Under the Michigan Rules of Evidence and the constitution, there was no proper basis to admit this evidence.

A. The Violation of the Michigan Rules of Evidence.

A four-prong test for admission of evidence under MRE 404(b) was articulated in *People*

v VanderVliet, 444 Mich 52, 55; 508 N.W.2d 114 (1993):

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

"[T]he prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b)." *People v Knox,* 469 Mich 502, 509; 674 NW2d 366 (2004) citing *People v Crawford,* 458 Mich 376; 582 NW 2d 785 (1998). "Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded." *Knox,* 469 Mich at 510. The "proponent of evidence bears the burden of establishing relevance and admissibility." *Crawford,* 458 Mich at n 6.

Crawford explained the following in relation to a prosecutor's mere proffer of evidence, that only recites a proper reason in a mechanical or conclusory fashion, but does not explain the actual relevance of the 404(b) evidence to a fact at issue.

> a common pitfall in MRE 404(b) cases is the trial courts' tendency to admit the prior misconduct evidence merely because it has been "offered" for one of the rule's enumerated proper purposes. Mechanical recitation of "knowledge, intent, absence of mistake, etc.," without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b). If it were, the prosecutor could routinely admit character evidence by simply calling it something else. [*Crawford,* 458 Mich at 387]

"Rule 404(b) does not authorize automatic admission, and the proponent of the evidence must demonstrate its relevance." 2 Weinstein, Federal Evidence, § 404.20[3], pp 404-41 to 404-42." *Crawford,* 458 Mich at 388 n 7. "Relevance is not an inherent characteristic, *Huddleston,* supra at 689, nor are prior bad acts intrinsically relevant to 'motive, opportunity, intent, preparation, plan,' etc. Relevance is a relationship between the evidence and a material

fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Crawford,* 458 Mich at 387 citing *Huddleston v United States,* 485 US 681; 108 S Ct 1496; 99 L Ed 2d 771 (1988) (other citation omitted).

"The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized." *Crawford,* 458 Mich at 388. "In order to ensure the defendant's right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else." *Id.* If the jury is improperly allowed to consider "other acts" evidence that is admitted for an improper purpose, no jury instruction can cure this error.[3]

In its second-amended notice, the prosecution identified motive as the basis for admitting Pinkney's political and community activities that occurred both prior to and after the events which are the basis of this prosecution. However, the prosecution did not (and could not, in any legitimate manner) provide this notice of motive with regard to the cross-examination of Pinkney. There was no proper relevance for nearly all of this evidence – including that for which notice was given – as required by *Crawford* and MRE 404(b).

"'A motive is the inducement for doing some act; it gives birth to a purpose.'" *Sabin,* 463

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[3] Jury instructions that have protected defendants against improperly admitted "other acts" evidence must involve striking the evidence and telling the jury to disregard it or telling the jury that the evidence may not be considered for purposes of determining whether the defendant is guilty. *People v Carter,* 415 Mich 558, 600-601; 330 NW2d 314 (1982) (jury told not to consider evidence for purposes of determining whether the defendant was guilty) citing *Richardson, infra,* and *Page, infra,* and overruled on on other grounds by *People v Robideau,* 419 Mich 458; 355 NW2d 592 (1984); *People v Richardson,* 239 Mich 695, 698-699; 214 NW 965 (1927) (struck evidence and told jury to disregard it); *People v Page,* 198 Mich 524, 538-539; 165 NW 755 (1917) (evidence of "other acts" was stricken and jury was told to completely disregard it); *People v Guenther,* 188 Mich App 174, 187; 469 NW2d 59 (1991) (vague reference to inadmissible "other act" was stricken and jury told to disregard it). When the jury is allowed to consider the evidence for an improper purpose under MRE 404(b) (i.e., the evidence is not effectively stricken), no jury instructions can cure this error.

Mich at 68-69 quoting *People v Kuhn,* 232 Mich 310, 312; 205 NW 188 (1925). Reverend Pinkney's speaking around the country and at various events, his political activity and his community activities were not a proper basis for finding a motive except on the basis of the following prohibited inference – because Pinkney was involved in these activities **before and after** the events herein and had **a propensity to be politically active and active in the community in a legal manner,** his propensity went a step further and also included a propensity to **illegally** change the dates on petitions and allow voters to sign the petitions twice.

This use of this evidence was clearly improper. The Michigan Rules of Evidence prohibit the use of a defendant's associational activity or group membership for the purpose of showing that the defendant was likely to have committed a specific crime because the crime was in conformity with his associational activity or membership in the group. *See, Bynum, supra,* 496 Mich 610 (analyzing matter under MRE 402, 404(a) and 702, this Court held "an expert witness may not use a defendant's gang membership to prove specific instances of conduct in conformity with that gang membership, such as opining that a defendant committed a specific crime because it conformed with his or her membership in a gang."). Similarly, one commentator specifically noted that the introduction of political beliefs and criticisms is not consistent with FRE 404(b). Note, *The Intelligence Identities Protection Act of 1982: an Assessment of the Constitutionality of Section 601(c),* 49 Brooklyn L Rev 479, 512 n 170 (1983) ("any attempt to introduce evidence of political beliefs or criticisms of the government to show that an intent to impair or impede is consistent with the defendant's character is impermissible. FED R EVID 404(b).").

Also, this Court's decision in *Sabin, supra,* indicates why the evidence was not admissible based on the prosecution's claim of motive – and that it actually involves prohibited propensity evidence. In *Sabin*, the Michigan Supreme Court rejected the theory that because the

defendant had molested girls in his family in the past, he had a motive to molest girls in his family again. In rejecting this theory, *Sabin*, 463 Mich at 68, indicated that the prosecution was actually offering propensity evidence that is prohibited under MRE 404(b) (emphasis added):

> In this case, the prosecution argues that defendant's **motive** was to have sex with young girls who were related to him and that the existence of this motive, as evidenced by other sexual misconduct with his stepdaughter, tended to prove that the sexual assault alleged by the complainant actually occurred. This proffered purpose is undistinguishable from the so-called "lustful disposition" rule. However, as stated, this Court has never adopted that rule, and we decline to do so here. **To accept the prosecutor's theory of logical relevance would allow use of the evidence for the prohibited purpose of proving defendant's character to show that he acted in conformity therewith** during the events underlying the charged offense.

In the case at bar, beyond the direct efforts to recall Hightower, the only thing that the proffered evidence of "other acts" established is that Reverend Pinkney has a propensity to engage in legal speech, legal political activities and legal community activities. These activities did not show a motive to commit illegal acts. The evidence was inadmissible under MRE 404(b) to attempt to establish a motive to alter recall petitions or allow people to sign petitions twice.

Also, the evidence was inadmissible under the third prong of the *VanderVliet* test, 444 Mich at 55 ("that the probative value of the evidence is not substantially outweighed by unfair prejudice."). Pinkney's political and social views are strongly opposed by a good number of people within the community. The fact that this is true is evident based on the nature of some of those activities – criticizing local institutions, politicians, judges and a local corporation (Whirlpool), sometimes in a very harsh manner (for example, claiming judges are committing crimes against humanity, see, *supra, pg 8*). Admitting evidence of activities that occurred both **before and after** the events charged herein – along with matters completely unrelated to the recall of Hightower and which are unpopular with many, presented the danger that some jurors

would be biased against him due to their disagreement with his viewpoints. Even if the evidence was somehow relevant, this danger greatly outweighed any possible relevance this evidence may have had.

Also, the court must be strict in its analysis regarding whether the third prong of the *VanderVliet* test was violated due to the constitutional status of Pinkney's political and community activity. See subsection B of this argument, *infra*. "'The right of an American citizen to criticize public officials and policies and to advocate peacefully for change is the central meaning of the First Amendment.'" *Lucas,* 203 F3d at 973 quoting *Glasson,* 518 F2d at 904 and *New York Times Co. v. Sullivan, supra,* 376 US at 273; see also, *Chappel,* 131 F3d at 576. One commentator noted the obvious danger of presenting a defendant's unpopular political beliefs and criticisms as having the potential for jurors to convict even if guilt is not clearly established. Lewis, *Proof and Prejudice: a Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 Wash L Rev 289, 325 & n 138 (1989) ("Several commentators have recognized evidence of uncharged misconduct can lead a jury to convict an accused, even if guilt of the charged offense has not been clearly demonstrated . . .." and, at n 138, "Although uncharged misconduct evidence is the most frequently mentioned source of this concern, **the same risk could be generated by evidence of a defendant's unpopular beliefs or associations.**") (emphasis added) (citations omitted).

Presentation of Pinkney's protected activities and views had the potential for improper prejudice. Beyond Hightower, Pinkney campaigned against and opposed certain government officials and Whirlpool – persons and an entity who are popular with many people in the community. He also takes other social and political positions that alienate many people in the community. This obviously involves criticism and expression of viewpoints that are protected by

our constitution, but which might be a basis to inflame some of the jurors.

The jury should not have been presented with these legitimate positions and activities of Pinkney when it had this potential for prejudice – and due to the lack of a proper purpose for admission. See, *Crawford,* 458 Mich at 383-384 ("Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged."). In Michigan's "system of jurisprudence, we try cases, rather than persons." *People v Allen,* 429 Mich 558, 566; 420 NW2d 499 (1988).

B. The First Amendment, the Michigan Constitution and MRE 403 were Violated.

The First Amendment, including the right to petition clause, and provisions of the Michigan Constitution were impacted by the introduction of Pinkney's political and community activities. Mich Const 1963, Art I, § 1 (all political power is inherent in the people), Art I, § 3 ("The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances") and Art I, § 5 (free speech).

The Court has "emphasized that 'the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations . . . simply because those beliefs and associations are protected by the First Amendment,'" *Wisconsin v. Mitchell,* 508 US 476, 486; 113 S Ct 2194; 124 L Ed 2d 436 (1993). However, "[s]uch testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government." *Haupt v United States,* 330 US 631, 642; 67 S Ct 874; 91 L Ed 1145 (1947) (involving statements that concerned "sympathy with Hitler and

hostility to the United States.").

The government violates a defendant's First Amendment rights to association and speech when it introduces evidence that is not relevant to the issues to be decided in the proceedings, especially when that evidence has the potential to be unfairly prejudicial. *Dawson v Delaware,* 503 US 159, 160; 112 S Ct 1093; 117 L Ed2d 309 (1992) (government violated the defendant's First Amendment right to association when it introduced evidence in a capital sentencing proceeding that he was a member of the Aryan Brotherhood, when "the evidence ha[d] no relevance to the issues being decided in the proceeding."). "Where a specific guarantee of the Bill of Rights such as the First Amendment is involved, courts must take 'special care' to assure itself that the [trial] court's alleged evidentiary error did not impermissibly infringe such guarantee as interpreted by the Supreme Court." *Blackmon v Booker,* 696 F3d 536, 555 (6th Cir 2012) (involving gang affiliation) (citation omitted).

The First Amendment also requires the court to "scrutinize with care"and "take special care" to insure First Amendment rights are not violated even if there is arguably some slight relevance in the case. This is particularly true with speech and activity that is at the core of the First Amendment. *New York Times v Sullivan, supra,* 376 US 254 (at the core of First Amendment protection is political speech while obscenity and defamation are at the periphery); *Chaplinsky, supra,* 315 US 568 ("high-value" speech, such as political speech has more constitutional protection than "low-value" speech, such as obscenity, commercial advertising, and false statement of fact).

Even First Amendment associational rights involved with gang membership receive a significant amount of protection in terms of whether it is admissible against a criminal defendant. *Dawson, supra*, 503 US 159; *United States v Irvin,* 87 F3d 860, 865 (7th Cir 1996); *United*

States v Roark, 924 F2d 1426, 1434 (8th Cir 1991) citing *Michelson v United States,* 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948); *United States v Jernigan,* 341 F3d 1273, 1285 (11th Cir 2003). This is consistent with the Michigan Supreme Court's approach in *Bynum, supra,* 496 Mich 610 (under MRE 402, 404(a) and 702, the court held "an expert witness may not use a defendant's gang membership to prove specific instances of conduct in conformity with that gang membership, such as opining that a defendant committed a specific crime because it conformed with his or her membership in a gang.").

Given that political activity and speech are at the core of First Amendment values, this principle must be applied with even more vigor in the case at bar. Admission of the "other acts" evidence violated Pinkney's First Amendment rights and rights under the Michigan Constitution related to the political power which the people inherently possess. Mich Const 1963, Art I, § 1 ("All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."), Art I, § 3 ("The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances."), Art I, § 5 (free speech). This is particular problematic in relation to the efforts to recall Sharon Tyler which occurred after Pinkney was charged herein. *Arim,* 206 Mich App at 189 ("[T]he First Amendment's protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government.") quoting *Potters Medical Center,* 800 F2d at 578.

Even if there was some relevancy in relation to some of this First Amendment activity, MRE 403 renders this evidence inadmissible. Any relevance was substantially outweighed by improper prejudice under the third prong of the *VanderVliet* test, 444 Mich at 55.

C. Due Process Violation.

Along with violating MRE 404(b) and the First Amendment, the admission of "other acts" evidence herein violated Due Process. *Manning v Rose,* 507 F2d 889, 894-895 (6th Cir 1974) (violation of Due Process if "other acts" evidence is tenuous in proving motive or another proper purpose; there must be a rational connection to the charged crime); *McKinney v Rees,* 993 F2d 1378, 1384 (9th Cir 1993) (admission of "other acts" evidence violates Due Process even when those acts might have some relevance in the form of propensity, but also have too strong of a tendency for improper prejudice and the evidence is "emotionally charged").

The danger presented by the "other acts" evidence in this case – that Pinkney may have been convicted based on his propensity to engage in legal activities, that are unpopular with some people, rather than based on sufficient evidence to prove he committed the charged crimes – has long been denounced by the U.S. Supreme Court. The Court has indicated this position is based, in part, on the constitution. *Boyd v United States,* 142 US 450, 458; 12 S Ct 292; 35 L Ed 1077 (1892) (in reversing conviction due to improper admission of "other acts" evidence, the Court stated: "Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community . . .."); *Brinegar v United States,* 338 US 160, 174; 69 S Ct 1302; 93 L Ed 1879 (1949) (indicating inadmissibility of prior bad act involved "historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property" and which rights are based on common law and the constitution); *Michelson,* 335 US at 475 ("courts that follow the common law tradition almost unanimously have come to

disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt….").

Under any test, there was a Due Process violation as the "other acts" evidence regarding matters not directly related to the recall of Hightower had no relevance to the issues at hand and could have sparked an emotional reaction from jurors.

II. No Crime Was Charged Under MCL 168.937 as it Only Provides the Penalty for Forgeries Prohibited Elsewhere in the Election Code.

Standard of Review: This issue involves the constitution and statutory construction. Both are reviewed *de novo*. *Grant, supra,* 470 Mich at 484 (preserved constitutional issues); *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW 2d 151 (2003) (statut ory construction).

Preservation of Argument: Pinkney raised the argument that MCL 168.937 is only a penalty provision and related Due Process arguments in the trial court at various points.[4] He also addressed these arguments in his opening brief on appeal and in a supplemental brief which the Court of Appeals granted leave for Pinkney to file after this Court's decision in *Hall, supra,* 499 Mich 446. The National Lawyers Guild also addressed these arguments in an *amicus curiae* brief filed pursuant to leave granted by the Court of Appeals.

The following arguments were presented to the Court of Appeals. However, the Court of

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[4] Pinkney raised the issues in the trial court in: (a) a Motion to Quash and a Revised Motion to Quash filed in June of 2014; (b) a written Motion for Directed Verdict, 12-10-14, see paragraph 6; see also, paragraph 7; and (c) Motions for Directed Verdict at the close of the government's case and at the close of all of the evidence (incorporating a supporting memorandum). (TT VI, 1485-1486; TT VII, 1785-1787).

However, Pinkney was not required to take any particular action to preserve issues that entitle him to a directed verdict. *Eg, People v Wolfe,* 440 Mich 508, 516, n 6; 489 NW2d 748 (1992). Moreover, the failure to charge a substantive offense is a jurisdictional issue that may be raised at any time. *People v Alvin Johnson,* 396 Mich 424, 440 & 444 n 18; 240 NW2d 729 (1976); *In re Coy,* 127 US 731; 758 8 S Ct 1263; 32 L Ed 274 (1888) (when face of the charging document does not state an offense, there is no jurisdiction) (citation omitted).

Appeals opinion did not address these issues – which are very important – and are presented in more detail below:

> (a) identical language must be construed in an identical manner in four (4) statutes, including MCL 168.937, that are adjacent to each other. MCL 168.934 to MCL 168.937 contain the following exact same language in relation to the penalties for misdemeanors (MCL 168.934), felonies (MCL 168.935), perjury (MCL 168.936) and forgery (MCL 168.937):
>
> > "Any person found guilty of [insert crime category] under the provisions of this act shall, unless herein otherwise provided, be punished . . ..";
>
> and
>
> (b) MCL 168.759(8) (enacted after the effective date of MCL 168.937) and the language proscribing forgeries under MCL 168.932(c) are rendered surplusage if MCL 168.937 is deemed to proscribe forgery of any and all election-related documents. The Court of Appeals opinion does not mention MCL 168.759(8) or this issue anywhere in its opinion.

Also, the fact that forgery and extrajudicial perjury were misdemeanors at common law is very relevant to why a rational legislature would have added penalty provisions for election-code forgery and perjury. Jurisdictions around the county, including Michigan, realized there was a need to elevate these crimes to felony status. As indicate in more detail below, these jurisdictions could only do this by statute.

A. The Question Presented Herein Was Not Decided in This Court's Opinion in *Hall.*

In *Hall,* 499 Mich at 449 n 2,[5] this Court specifically held that it was not addressing the

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[5] Footnote 2 (emphasis added) states, in pertinent part:

> Although the defendant argued in the Court of Appeals that MCL 168.937 does not create a substantive offense, he did not appeal this holding or otherwise pursue this argument, and the parties did not otherwise ask us to review it. **We therefore decline to reach this question.**

question that Pinkney presents herein – whether MCL 168.937 is only a penalty provision that does not substantively proscribe forgery. This was due to Hall's failure to properly present this argument in the Michigan Supreme Court – even though he did so in the Court of Appeals.

As this issue was not raised and briefed before the Michigan Supreme Court in *Hall*, the *Hall* opinion is not precedential in relation to this issue. "Questions which 'merely lurk in the record,' *Webster v Fall,* 266 US 507, 511 (1925), are not resolved, and no resolution of them may be inferred." *Illinois State Board of Elections v Socialist Workers Party,* 440 US 173, 183; 99 S Ct 983; 59 L Ed 2d 230 (1979). This principle has long been recognized in American jurisprudence and in Michigan case law. *People v Jory,* 443 Mich 403, 414 n 8; 505 NW2d 228 (1993) ("The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent.") quoting *Breckon v Franklin Fuel Co,* 383 Mich 251, 267; 174 NW2d 836 (1970) in turn quoting *Cohens v Virginia,* 19 U.S. (6 Wheat) 264, 399; 5 L Ed 257 (1821); *Currie v Fiting,* 375 Mich 440; 134 NW2d 611 (1965) quoting *Larzelere v Starkweather,* 38 Mich 96, 101 (1878) and *Cohens, supra.* "No logical extensions . . . are permitted" under these circumscribes. *Weeren v Evening News Asso,* 379 Mich 475, 503; 152 NW2d 676 (1967) citing *Larzelere, supra* and *Cohen*, *supra* (other citations omitted).

B. The Election Code as it Existed When MCL 168.937 Went Into Effect in 1955 Supports Pinkney's Argument. A Later Amendment Also Supports Pinkney's Argument.

The plain language and structure of the 1954 Public Act which created MCL 168.937 supports the argument that the legislature intended MCL 168.937 to be a penalty provision and that MCL 168.932(c), which was also created by same 1954 Public Act, substantively proscribed forgery of some, but not all, election code documents. The passage of this Act must be considered in the light of the common law that indicated forgeries were misdemeanors. The fact

that forgeries were misdemeanors at common law had been a concern to legislatures across the country that thought many forgeries deserved harsher punishment.

Also, a later amendment to the election code resulted in MCL 168.759(8) which added absentee ballots to the types of election-code documents that could be the basis of a felony prosecution for forgery – with MCL 168.937 providing the penalty for a violation of MCL 168.759(8). This addition also supports the argument that MCL 168.937 is a penalty provision and does not substantively proscribe any and all forgeries of documents related to elections. The addition of MCL 168.759(8) is surplusage if MCL 168.937 had already substantively prohibited forgery of any and all election code documents.

i. The Legislature is Presumed to Have Known that, in Order to Punish Forgery as a Felony, it Had to Raise the Level of Punishment for Forgery by Statute.

As indicated in more detail below, in passing Public Acts 1954, No. 116, the legislature established two penalty provisions to ensure certain matters were penalized as 5-year felonies (unless otherwise specified in the election code): (a) all forgeries proscribed by other election-code statutes; and (b) some, if not all, perjuries proscribed by election-code statutes. The legislature must be presumed to have known that these crimes would be considered misdemeanors unless the legislature established that they were felonies. This is because all types of forgery and some types of perjury were misdemeanors at common law.

If forgeries and all perjuries had been felonies at common law, there may have been no need for the legislature to specify that, by default, any forgery or perjury proscribed by other sections of the election code would be punished as felonies. If the common law had designated these crimes as felonies, the general provision providing punishment for felonies, MCL 168.935,

may have been sufficient to apply to all forgeries and all perjuries by default.

a. The Legislature Knew it Needed to Provide a Statutory Scheme that Elevated the Punishment for Forgery and Some Forms of Perjury Due to the Fact that Forgeries and Some Perjuries were Misdemeanors at Common Law.

Forgery was never a felony at common law and did not become a felony unless elevated to that status by statute. *Van Alstine,* 57 Mich at 72-73 (explaining forgery was a misdemeanor at common law and that only by the means of statutes did it rise to the level of a felony); *Jerome,* 318 US at 108 n 6 ("Forgery at common law was a misdemeanor. Wharton, *supra,* § 861."); *Watson,* 423 US at 440 (Marshall, J, dissenting). Case law indicates a history of most states raising forgery to felony status, for specific enumerated documents, by statute. *See, eg, State v Anderson,* 24 Del 135, 138; 74 A 1097, 1098 (Del Ct Gen Sess1910) (instruction indicating "at common law, forgery was a misdemeanor * * * statutes have been enacted in Delaware, **as in most of the States, particularly enumerating acts** which constitute the offense, and at the same time making such acts felonies instead of misdemeanors, and providing for their perpetration more severe punishments.") (emphasis added); *Hamilton v State,* 35 Ala App 570, 571; 50 So2d 449 (Ala Ct App 1951) ("At common law the offense of forgery was a misdemeanor. In this State, statutes have been passed which completely absorb the common-law of offense."); *State v Murphy,* 24 A 473, 475 (RI SCt 1892) ("Wharton, in his excellent work on Criminal Law, (volume 1, § 654,) says: 'By the common law forgery is a misdemeanor.' By statutes passed in England and the United States, various kinds of forgery are made felonies."); *State v Rowe,* 42 SCL 17 (SC App Law 1854) ("the remaining inquiry is, whether forgery is a

felony? It is conceded, that at common law it was only a misdemeanor, and was so held to be in South Carolina until 1801 when it was declared to be a felony" by statute).

Michigan also did this for specific types of documents that are unrelated to elections. The current version of this statute is MCL 750.248. Prior to passage of Public Act 1954, No. 116, this Court held that if a person forged a document that was not listed in the forgery statute under which the defendant was charged, then the case had to be dismissed. *People v Smith,* 112 Mich 192; 70 NW 466 (1897); *People v Parker,* 114 Mich 442, 444-445; 72 NW 250 (1897); see also, *People v Susalla,* 392 Mich 387, 393; 220 NW2d 405 (1974) ("The offense of forgery is complete when a person falsely makes **any writings enumerated in the statute**, with intent to deceive, in a manner which exposes another to loss.") (emphasis added).

Some types of offenses that we now classify as perjury were also misdemeanors at common law. False swearing, that occurred in a context other than judicial proceedings, was a misdemeanor at common law. *People v Ramos,* 430 Mich 544, 573-574; 424 NW2d 509 (1988) (Boyle, J, dissenting) (at common law, the only perjury which constituted a felony had to occur within judicial proceedings, while "false swearing" was a misdemeanor at common law that involved extrajudicial swearing under oath) quoting Perkins & Boyce, *Criminal Law* (3d ed), p. 511. By definition all, or nearly all, perjury offenses under the election code would have been misdemeanors at common law, as most, if not all, swearing in relation to the election process does not involve the judicial process. Many states also transformed the common law status of extrajudicial false swearing by enacting statutes that changed the categorization of the crime with the statutes often labeling all false statements under oath as "perjury." *Ramos,* 430 Mich at 574-576 quoting Perkins & Boyce, at p. 512.

For purposes of the election code, for both forgery and perjury, the Michigan legislature

was aware – based on the common law – that it needed to ensure, by default, that the crimes of forgery and perjury as proscribed by other sections of the election code would be punished as felonies unless otherwise stated in the election code. The legislature did this by enacting MCL 168.937 (penalty statute for forgery proscribed by other sections of the election code) and MCL 168.936 (penalty statute for perjury proscribed by other sections of the election code). Without doing this, the punishment for forgery would be, by default unless otherwise specified in the election code, provided by the statute for punishment of misdemeanors, MCL 168.934. The same would have been true with most, if not all, election-code perjury.

b. The Legislature is Presumed to Be Aware of the Common Law When it Enacts Legislation.

This is the framework under which the legislature labored when it designated the penalty for election-code forgeries under MCL 168.937. When enacting legislation, the legislature is presumed to know the common law. *People v Moreno,* 491 Mich 38, 46; 814 NW2d 624 (2012) ("We must presume that the Legislature 'know[s] of the existence of the common law when it acts.'") (footnote omitted) quoting *Wold Architects & Engineers v Strat,* 474 Mich 223, 234; 713 NW2d 750 (2006) and citing *Dawe v Dr Reuven Bar-Levav & Assoc, PC,* 485 Mich 20, 28; 780 NW2d 272 (2010); see also, *Thomas v Department of State Highways,* 398 Mich 1, 10; 247 NW2d 530 (1976) ("Words and phrases which have acquired meaning in the common law are interpreted as having the same meaning when used in statutes dealing with the same subject matter as that which they were associated at the common law.") (citations omitted).

ii. Public Acts 1954, No. 116, Created MCL 168.937 and Three (3) Other Penalty Provisions that Contain Identical Language.

Public Acts 1954, No. 116, effective June 1, 1955, established four (4) penalty

provisions, including MCL 168.937.[6] The other penalty statutes – which immediately proceed MCL 168.937 – relate to perjury (MCL 168.936), felonies in general (MCL 168.935) and misdemeanors (MCL 168.934). These three (3) other penalty provisions contain the same following language that is set forth in MCL 168.937: "Any person found guilty of [insert crime category] under the provisions of this act shall, unless herein otherwise provided, be punished . . .." All four (4) of these statutes then follow this language with the applicable penalties. None of these four (4) statutes have been amended since they went into effect on June 1, 1955.

iii. Identical Language in Statutes Should Receive Identical Construction – Consistent with the Plain Language in Each Statute.

None of these four (4) penalty provisions, MCL 168.934 to MCL 168.937, can be deemed to create substantive offenses. First, the penalty statutes for misdemeanors and felonies in general reference no particular type of crime. For instance, MCL 168.935 just states: "Any person who shall be found guilty of a felony under the provisions of this act shall, unless herein otherwise provided, be punished" under the penalty specified in the statute. You can delete "felony" from this quoted text and replace it with "forgery," "perjury" or "misdemeanor" to arrive at the exact language for each of the other statutes. The available fines and imprisonment for each statute then follow this text.

This identical language in each statute must be construed in an identical manner. "'Identical language should certainly receive identical construction when found in the same act.' *People ex rel Simmons v Munising Twp,* 213 Mich 629, 633; 182 NW 118 (1921)." *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 155-156; 545 NW2d 642 (1996); *accord, People v Parks,* 483 Mich 1040, 1061; 766 NW2d 650 (2009) citing *Munising Twp, supra*; see also,

[6] The relevant pages from Public Acts 1954, No. 116 are attached as Appendix A.

People v Bonilla-Machado, 489 Mich 412, 436-438; 803 NW2d 217 (2011) (Markman, concurring) (citations omitted).

The plain language of each of these statutes, as it existed in 1955 and as it currently exists, only involves the penalty when a felony, misdemeanor, perjury or forgery is committed "under the provisions of this act." The language does not create substantive offenses in relation to any common law felony, misdemeanor, perjury or forgery in relation to any aspect of the election code. However, in relation to MCL 168.937, the Court of Appeals found otherwise due to what it believed was a correct policy to ensure the purity of the election process and because of what it claimed to be an "absurd result." *Pinkney,* 316 Mich App at 463-64.

The judiciary may not go beyond the plain language of each statute and make an exception to the plain language because it believes a proper purpose is best achieved by expanding the language or because it labels a result "absurd" when the legislature could have intended the result of the plain language. *Mich Educ Ass'n v Sec'y of State,* 489 Mich 194, 223-224; 801 NW2d 35 (2011); *see also, Robinson v City of Detroit,* 462 Mich 439, 467; 613 NW2d 307 (2000) (it is "the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature").

Here, the "absurd result" is supposedly limiting forgery prosecutions to the documents listed in MCL 168.932(c) and MCL 168.759(8). However, the legislature could have easily thought these were appropriate limitations. MCL 168.932(c) limits forgery prosecutions to persons who have heightened responsibilities in relation to elections or election documents ("[a]n inspector of election, clerk, or other officer or person having custody of" the records listed in the statute). MCL 168.759(8) expanded forgery prosecutions to persons who forge absentee ballots. The legislature could have fully recognized the "chill" on electoral rights of citizens who

are not employed by the government if forgery prosecutions were to include prosecution, as a 5-year felony, of any citizen in relation to forgery of any and all election-related documents. It is absolutely clear that the legislature could consider this "chilling issue" as important. *See, Rhodes,* 393 US at 31 ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.") (footnote omitted) quoting *Wesberry,* 376 US at 17; see also, *Wilkins,* 385 Mich at 680-81 ("It can be stated without exaggeration that the right to vote is one of the most precious, if not the most precious, of all our constitutional rights.").

This issue also involves important separation of powers principles under the Michigan Constitution. "Statutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of" the judiciary. *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 582; 702 NW2d 539 (2005). Any such judicial revision or amendment of plain language involves a court "impermissibly legislat[ing] from the bench." *Devillers,* 473 Mich at 582. The judiciary must function within its "constitutional responsibility . . . to act in accordance with the constitution and its system of separated powers, by exercising the judicial power and only the judicial power." *Devillers,* 473 Mich at 583 (footnote omitted) quoting *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co,* 471 Mich 608, 637; 684 NW2d 800 (2004).

Finally, if the legislature wishes to provide that forgery of additional election-code documents can be prosecuted, it should provide for this with plain language in a statute. *People v Underwood*, 278 Mich App 334, 339; 750 NW 2d 612 (2008). This is the role of the legislature and not the role of the courts.

iv. The 1954 Public Act Also Created MCL 168.932(c) Which Proscribes Forgery of Limited Categories of Election-Code Documents.

Again, Public Acts 1954, No. 116 also created at least one statute that affirmatively proscribed forgery of certain documents by certain persons, MCL 168.932(c). The language contained in MCL 168.932(c) set forth the same elements as the common law definition of forgery that had been established long before 1954. The current version of MCL 168.932(c) (emphasis added), which has not changed in substance since it went into effect in 1955, states:

> (c) An inspector of election, clerk, or other officer or person having custody of any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description, which pursuant to this act is directed to be made, filed, or preserved, shall not willfully destroy, mutilate, deface, falsify, or fraudulently remove or secrete any or all of those items, in whole or in part, or **fraudulently make any entry, erasure, or alteration on any or all of those items,** or permit any other person to do so.

Hall set forth case law regarding the common law definition which makes it clear that MCL 168.932(c) proscribes forgery. *Hall*, 499 Mich at 456 and n 31 ("The common-law definition of forgery is a false making, or a making *malo animo* of any written instrument with intent to defraud.") quoting *People v Warner*, 104 Mich 337, 340; 62 NW 405 (1895) (footnote omitted); *Hall,* 499 Mich 456, n 31 ("*People v Susalla*, 392 Mich 387, 390; 220 NW2d 405 (1974) ('[F]orgery includes any act which fraudulently makes an instrument purport to be what it is not.') (citation and quotation marks omitted)."

Other case law, which Pinkney quoted at pg 46 of his opening brief in the Court of Appeals, also clearly states the common law definition of forgery. *People v Larson,* 225 Mich 355, 358-359; 196 NW 412 (1923) ("Forgery includes any act which fraudulently makes an instrument purport to be that which it is not. *People v Marion,* 29 Mich 35."); *People v Van Horn,* 127 Mich App 489, 490; 339 NW2d 475 (1983) ("Forgery is defined as making a false

document described in the statute, with intent to deceive, in a manner which exposes another to loss. *People v Susalla,* 392 Mich 387, 393; 220 NW2d 405 (1974).").

v. Consistent with the Legislature's Enactment of MCL 168.932(c) which Substantively Proscribed Forgeries, the Legislature also Provided for Separate Statutes – Beyond the Penalty Statutes – to Substantively Proscribe Perjury, Other Felonies and Misdemeanors.

When the legislature proscribed forgery of certain documents as set forth in MCL 168.932(c) by Public Acts 1954, No 116, it also created other substantive provisions that proscribed perjury, certain felonies and certain misdemeanors as follows – that were independent of the aforementioned penalty provisions related to those crimes:

(a) election-code statutes that proscribe perjury under specified circumstances, MCL 168.729, MCL 168.756, MCL 168.933;

(b) a statute that lists numerous misdemeanor offenses, MCL 168.931; and

(c) subsections (a), (b) and (d) of MCL 168.932 which proscribe specific election-related felonies that did not involve either perjury or forgery.

Statutes "that relate to the same subject matter" must be construed in such a manner as to "produce a harmonious whole" and remain consistent. *Fradco, Inc v Dep't of Treasury,* 495 Mich 104, 115; 845 NW2d 81 (2014) (footnotes and citations omitted). The statutory language must be read "in pari materia" which requires the text to "be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *World Book v Revenue Div,* 459 Mich 403, 416; 590 NW2d 293(1999) (citations omitted).

The structure of the election code must be read in a harmonious manner – with each of these penalty provisions applying only when some other section(s) of the election code proscribes forgery, perjury or other crime.

vi. One (1) Other Section of the Election Code, Enacted after 1955, Also Proscribes Forgery. It Must Be Presumed the Legislature Knew of MCL 168.937 When it Enacted the New Statute.

MCL 168.759(8) indicates it is a felony to forge a signature on an absentee ballot application. This provision was added by Public Acts 1995, No. 261. It does not contain a penalty provision. Thus, the legislature decided to add to the types of forgery that are penalized under MCL 168.937.

It is presumed that the legislature had knowledge of MCL 168.937 when it added the language proscribing forgery in MCL 168.759(8). "[I]t is a well-established principle that the Legislature is presumed to be aware of all existing statutes when enacting new law. *Walen v Dep't of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993)." *Nemeth v Abonmarche Development, Inc,* 457 Mich 16, 43; 501 NW2d 641 (1998). Under these circumstances, "the 'whole chapter' [of an Act is] "'to be read as one act, with its several parts and clauses mutually acting on each other as their sense requires.' Correspondingly, Sands advises, 'whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter,' and 'legislation is never written on a clean slate, nor is it ever read in isolation or applied in a vacuum.'" *Livingstone v Department of Treasury,* 434 Mich 771, 786; 456 NW2d 684 (1990) quoting *Sproat v Hall,* 189 Mich 28, 32, 155 NW 361 (1915) and 2A Sands, Sutherland Statutory Construction (4th ed), Secs 51.02, 53.01, pp. 453, 549.

If the legislature deemed MCL 168.937 as providing for felony liability for forgery of any and all election-code documents, there would have been no need to add the provision in MCL 168.759(8). "Particularly important here is the rule that the Legislature generally does not cover the same ground in separate statutes. See *Bd of Control of the Michigan State Prison v. Auditor*

General, 197 Mich 377, 382, 163 NW 921 (1917); *People v Smith,* 423 Mich 427, 441, 378 NW2d 384 (1985) (Williams, C.J.) (the Legislature may be presumed to know of existing legislation on the same subject)." *People v Rogers,* 438 Mich 602, 616; 475 NW2d 717 (1991) (Brickley, J, concurring).

MCL 168.937 and MCL 168.759(8), along with the rest of the election code, should be interpreted as involving one harmonious system of law, with the general course of the legislation establishing that the legislature would not have enacted MCL 168.759(8) if the legislature intended MCL 168.937 to substantively proscribe the forgery of any and all election code documents. This basis of statutory construction is well established in Michigan as indicated in *IBM Corp v Department of Treasury,* 496 Mich 642, 652-653; 852 NW2d 865 (2014) (footnote omitted) quoting *Rathbun v State of Michigan,* 284 Mich 521, 543-544; 280 NW 35 (1938):

> It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. In other words, in determining the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions.

vii. If MCL 168.937 is Deemed to Prohibit Forgeries of Any and All Documents Under the Election Code, MCL 168.932(c) and MCL 168.759(8) are Rendered Surplusage.

Any claim that MCL 168.937 creates substantive crimes based on the forgery of any and all election-related documents, by any person, renders other sections of the election code that

prohibit forgery, such as MCL 168.932(c) and MCL 168.759(8), as surplusage – contrary to Michigan law. MCL 168.937 must be interpreted in relation to these statutes, to not render them as mere surplusage, and in harmony with these statutes and the entire statutory scheme. As stated in *People v Cunningham,* 496 Mich 145, 153-154; 852 NW2d 118 (2014) statutes are interpreted:

> so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker,* 219 Mich 178, 182-183; 189 NW 221 (1922). This Court " must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146; 644 NW2d 715 (2002). We also consider the statute's " 'placement and purpose in the statutory scheme,'" *Sun Valley Foods Co v Ward,* 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted), and in interpreting related statutes, those in pari materia, we construe the statutes together " so as to give the fullest effect to each provision," *Glover v Parole Bd,* 460 Mich 511, 527; 596 NW2d 598 (1999), citing *Parks v DAIIE,* 426 Mich 191, 199; 393 NW2d 833 (1986).

viii. The *Morissette* Doctrine and Ensuring that any Provisions that Involve Both the *Actus Reus* and *Mens Rea* for Forgery are Punished under MCL 168.937.

"Under Michigan's common law, every conviction for an offense required proof that the defendant committed a criminal act (actus reus) with criminal intent (mens rea)." *People v Janes,* 302 Mich App 34, 41; 836 NW2d 883 (2013) citing *People v Likine,* 492 Mich 367, 393; 823 NW2d 50 (2012), *People v Tombs,* 472 Mich 446, 451; 697 NW2d 494 (2005) (opinion by KELLY, J.) (in turn citing *People v Rice,* 161 Mich 657, 664; 126 NW 981 (1910)) and *Tombs,* 472 Mich at 466 (TAYLOR, C.J., concurring) (in turn citing *People v Roby,* 52 Mich 577, 579; 18 NW 365 (1884) (COOLEY, C.J.)).

Two (2) years prior to the enactment of Public Acts 1954, No. 116, the Court issued the

seminal opinion of *Morissette v United States,* 342 US 246; 72 SCt 240; 96 LEd 288 (1952). *Morissette* indicated that courts should often assume that the legislature intended that a particular *mens rea* applies to a criminal statute which supplies the *actus reus,* even if the statute does not expressly state the *mens rea* requirement.

In 1954, the legislature could have rationally believed that some statutes containing the *actus reus* for forgery (i.e., making a false statement in a document that makes it appear to be something that is not), would be interpreted to also involve the *mens rea* for forgery (a fraudulent intent) even if that fraudulent intent was not expressly stated in the statute. That is still a concern today as Michigan courts continue with this type of analysis. *Tombs,* 472 Mich at 451 (this Court "tend[s] to find that the Legislature wanted criminal intent to be an element of a criminal offense, **even if it was left unstated.**") (emphasis added).

With this in mind the election code is very lengthy, containing numerous chapters and statutes – and has been, and will be, amended over the years. There are likely many requirements, currently in the various chapters and likely to be added to the various chapters, that involve (or will involve) not making false statements within election-code documents. MCL 168.937 ensures that any statute which is interpreted as involving both the *actus reus* and *mens rea* for forgery, but which fails to specify the penalty, will be punished under MCL 168.937 – and not as a misdemeanor.

There are currently at least two (2) provisions that contain the *actus reus* for forgery, but which do not specifically indicate a fraudulent intent – and which do not specify whether the penalty is for a misdemeanor or for a felony. MCL 168.590h(3) ("(3) A person shall not knowingly . . . sign a name other than his or her own on the petition."); MCL 168.685(8) ("(8) A person shall not knowingly . . . sign a name other than his or her own on the petition.").

While each of these statutes contains the language that this Court deemed, in *Hall,*[7] not to require fraudulent intent, the legislature may have wished to ensure, by default, a forgery penalty for any statute deemed to require both the *actus reus* and *mens rea* for forgery. The legislature ensured that MCL 168.937 will be the penalty provision, by default, if: (a) any Michigan court interprets any other election-code statute as involving both the *actus reus* and *mens rea* for forgery based on the analysis provided in *Morisette, supra,* (or if the forgery *mens rea* is stated explicitly); and (b) that other election-code statute does not indicate whether it is a misdemeanor or felony. Indeed, a rational legislature may have believed MCL 168.590h(3), MCL 168.685(8) and other similar provisions contain, by implication pursuant to *Morissette,* a fraudulent intent requirement.

C. The Doctrine of Strict Construction, the Rule of Lenity, Due Process and the Vagueness Doctrine Require that the Statute Not Be Applied Herein.

In considering these matters, it should first be remembered that criminal statutes are to be strictly construed and not found to encompass behavior that is not clearly within the scope of the statute. *People v Jahner,* 433 Mich 490, 498-499; 446 NW2d 151 (1989).[8] This rule is based on

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[7] *Hall,* 499 Mich at 458 analyzing MCL 168.544c(8) which states that " an individual shall not . . . **sign a petition with a name other than his or her own."** (emphasis added) Under MCL 168.544c(9), this involves a misdemeanor.

[8] As stated in *Jahner,* 433 Mich at 498:

Criminal statutes are to be strictly construed:

> It is a fundamental rule of construction of criminal statutes that they cannot be extended to cases not included within the clear and obvious import of their language. And if there is doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the defendant. In other words, nothing is to be added by intendment. [People v Ellis, 204 Mich 157, 161; 169 NW 930 (1918).]

concerns of notice, but it also involves the fact that it is the function of the legislative branch, and not the judiciary, to establish, by statute, laws that proscribe criminal conduct and establish criminal penalties. *Jahner,* 433 Mich at 498-499 quoting *People v Willie Johnson,* 75 Mich App 221, 225; 255 NW2d 207 (1977), aff'd 406 Mich 320, 279 NW2d 534 (1979).

Similar to this rule of strict construction, Due Process and the Rule of Lenity require that the courts construe any ambiguity – as to whether MCL 168.937 involves merely a penalty as opposed to substantively proscribing forgery of any and all election related documents – favorably to Pinkney. Due Process also requires that any vagueness in relation to this statute must be resolved favorably to Pinkney.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v New Jersey,* 306 US 451; 453, 59 S Ct 618; 83 L Ed 888 (1939). The Due Process Clause of the Fourteenth Amendment requires that laws must provide sufficient guidelines to allow an ordinary person to determine whether the person's conduct is proscribed by the law. **"The axiomatic requirement of due process** that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning, *see Lanzetta v New Jersey,* 306 US 451, 453; 83 L Ed 888; 59 S Ct 618 (1939) (citing *Connally v General Construction Co,* 269 US 385, 391; 70 L Ed 322; 46 S Ct 126 (1926)), carries the **practical consequence** that a defendant charged under a valid statute will be **in a position to understand with some specificity the legal basis of the charge against him."** *Schad v Arizona,* 501 US 624, 632-33; 111 S Ct 2491; 115 L Ed 2d 555 (1991).

Any ambiguity as to whether MCL 168.937 is just a penalty provision must be construed in favor of the defendant. Michigan construes statutory ambiguity strictly in favor of defendants

under the rule of lenity. *People v Gilbert*, 414 Mich 191, 211; 324 NW2d 834 (1982); *People v Rutledge*, 250 Mich App 1, 5; 645 NW2d 333 (2002). This rule of statutory construction is required by Due Process. *Dunn v United States,* 442 US 100, 112-113; 99 S Ct 2190; 60 L Ed2d 743 (1979) (citations omitted) (the rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."); *United States v Lanier,* 520 US 259, 265-266; 117 S Ct 1219; 137 L Ed 2d 432 (1997) (rule of lenity is based on the same constitutional issues as the vagueness doctrine).

Also, any vagueness regarding MCL 168.937 must be resolved in favor of Pinkney. *People v Lino,* 447 Mich 567, 575 n 2 & 575-576; 527 NW2d 434 (1994); *Kolender v Lawson,* 461 US 352, 357; 103 S Ct 1855; 75 L Ed 2d 903 (1983) (setting forth constitutional requirements under the vagueness doctrine) (citations omitted).

WHEREFORE, Defendant Pinkney prays that this court vacate and reverse his convictions.

Respectfully submitted,

Date: June 28, 2017

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Certificate of Service

I hereby certify that I am counsel for a party and that on June 28, 2017 I filed the foregoing document through the TrueFiling electronic filing system, and that the foregoing document was served upon all counsel of record through the electronic filing system.

Date: June 28, 2017

/s/ Timothy M. Holloway
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